

Darko v Guerrino

2017 NY Slip Op 32981(U)

June 26, 2017

Supreme Court, Westchester County

Docket Number: 66554/2016

Judge: Lawrence H. Ecker

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

-----X
ALBERTA DARKO,

Plaintiff,

INDEX NO. 66554/2016

-against-

DECISION/ORDER

GARY C. GUERRINO, M.D., GREGORY STANLEY, M.D., ERIN MURPHY, M.D., LAWRENCE MEDICAL ASSOCIATES, P.C. and NEW YORK-PRESBYTERIAN HOSPITAL/COLUMBIA UNIVERSITY MEDICAL CENTER,

**Motion Seq. 1, 2
Submitted: 5/3/17**

Defendants.
-----X

ECKER, J.

The following papers numbered 1 through 62 were read on the motion of ALBERTA DARKO ("plaintiff") [Mot. Seq. 1], made pursuant to CPLR 3124, CPLR § 3126 and CPLR 3211(b), for an order striking the affirmative defense of lack of personal jurisdiction raised by each defendant, and pursuant to CPLR § 306-b, for an order granting an extension of time to serve the summons and complaint, as against GARY C. GUERRINO, M.D., GREGORY STANLEY, M.D., ERIN MURPHY, M.D., LAWRENCE MEDICAL ASSOCIATES, P.C. and NEW YORK-PRESBYTERIAN HOSPITAL/COLUMBIA UNIVERSITY MEDICAL CENTER; and the cross-motion of GREGORY STANLEY, M.D. ("Stanley") [Mot. Seq. 2], made pursuant to CPLR 3211(a)(8), for an order dismissing the complaint:

PAPERS

NUMBERED

Notice of Motion, Affirmation, Exhibits A-Y ¹	1 - 27
Notice of Cross-Motion, Affirmation in Opposition/ Support, Exhibits A-N	28 - 43
Affirmation in Partial Opposition to Motion (Guerrino)	44

¹ Court rules require plaintiff to use numbered exhibit tabs and to not repeat the same exhibit number within the same motion sequence(s).

Affirmation in Opposition to Cross-Motion/Reply to Motion, Exhibits A-M	45 - 58
Affirmation in Reply to Guerrino's Limited Opposition	59
Affirmation in Reply to Cross-Motion, Exhibits A-B	60-62

Upon the foregoing papers, the court determines as follows:

In this action to recover damages for medical malpractice and lack of informed consent, plaintiff alleges she was injured as a result of the conduct of defendants during the time period June 1, 2014 through June 14, 2016. The summons and complaint were filed on November 2, 2016, prior to the expiration of the 2 ½ year statute of limitations applicable to medical malpractice actions [CPLR § 214-b]. Plaintiff alleges that each defendant was duly served within the 120 days required pursuant to CPLR § 306-b. Each defendant filed an answer within the time prescribed pursuant to CPLR 320, and included in the answer, inter alia, the defense of failure to obtain personal jurisdiction.

As a pre-emptive measure, plaintiff made the instant motion to strike the affirmative defense of lack of personal jurisdiction, and to obtain an extension of time to serve, should service not be sustained as originally attempted. All defendants with the exception of Guerrino are represented by the same attorneys. Of these defendants, only Stanley has opposed the motion, and made the cross-motion. Guerrino filed a limited objection to the motion, stating that he does not oppose the striking of the affirmative defense of lack of personal jurisdiction as to him, while reserving the right to contest certain of the factual allegations in the "Preliminary Statement" presented by plaintiff.

As stated, *supra*, it is only Stanley who opposes the motion, and has made the cross-motion to dismiss. Hence, the motion to strike the affirmative defense of lack of personal jurisdiction is granted as to Erin Murphy, M.D., Lawrence Medical Associates, P.C. and New York Presbyterian/Columbia University Medical Center. The remaining issues to be resolved include (1) the waiver of the affirmative defense of lack of personal jurisdiction by Stanley's "partial appearance"; (2) the sufficiency of service of process on Stanley; (3) the necessity of a traverse hearing; (4) the availability of CPLR § 306-b to plaintiff; and (5) the dismissal of the action as to Stanley.

The chronology of events is important. As stated, *supra*, the summons and complaint were filed on November 2, 2016. According to the affidavit of service sworn to by Megan Patrick, Stanley was served by substitute service upon "Brian Woody (Co-Worker)" on December 22, 2016 at 971 Lakeland Drive, Jackson, Ms., followed by mailing that same day to Stanley at 2500 N. State Street, Jackson, Ms. [Stanley Ex. B].

Stanley has submitted his own affidavit [Stanley Ex. E] specifically denying that 971 Lakeland Drive was ever his actual place of business, dwelling place, or usual place of abode. On the date in question, he was employed by the University of Mississippi Medical Center and his actual place of business was 2500 North State Street in Jackson, the same address and location as that of Branion Woody, but that at no time did he designate Woody to be his agent

for service of process. Woody did give him papers [Stanley Ex. D] that were left with Woody for Stanley, but not the summons and complaint in this action. Stanley avers that on December 22, 2016, he was in the operating room at the University of Mississippi Medical Center; that he has not concealed his whereabouts, and that he did not receive a copy of the summons and complaint at his place of business, dwelling place, usual place of abode, or from an agent for process.

Branion Woody provided an affidavit [Stanley Ex. F] stating he was not designated Stanley's agent for process, that he did receive papers for Stanley from an African-American male on December 22, 2016 at the 2500 North State Street address, and that the papers he took for Stanley are the ones included in Stanley Ex. D which refer to what appears to be a Colorado real estate matter.

Ashley Merritt, a co-employee of Stanley and Woody, submitted an affidavit for Stanley [Stanley Ex. G] stating that on December 22, 2016, at the 2500 North State Street address, she saw an African-American male hand Woody papers for Stanley.

Peter Feldman, the process server retained by plaintiff's attorneys to serve Stanley and Dr. Erin Murphy, submitted an affidavit [Stanley Ex. J] that he forwarded the summons and complaint to Michael Walrod, the owner of HPS Process Server and Investigations, in Mississippi, and that "Mr. Walrod received said legal papers and had his employee, Megan Patrick, serve Dr. Gregory Stanley."

Michael Walrod submitted an affidavit for Stanley [Stanley Ex. K] stating he assigned a "subcontractor, Megan Patrick to serve Dr. Gregory Stanley."

Megan Patrick submitted an affidavit for Stanley [Stanley Ex. L] stating she was retained by Walrod to serve Stanley and Murphy in Mississippi. She described five attempts at service at 2500 North State Street between November 15, 2016 and December 19, 2016 prior to serving Woody, and that she made an error in describing the place of service as being 971 Lakeland Drive, when she intended to state 2500 North State Street as the location where she served Woody.²

Plaintiff first argues that Stanley has waived the defense of lack of service by his appearing in this action, by service of an answer, and by initiating and participating in pre-trial disclosure proceedings, as outlined in ¶¶ 26 (a) through (k) and ¶ 27 of his attorney's affirmation. It is plaintiff's position that whether or not Stanley made the motion to dismiss for lack of personal jurisdiction within sixty (60) days, as required by CPLR 3211(e) is of no moment,

² The court notes that Erin Murphy, M.D., who has not opposed the motion, was personally served by Megan Patrick at 971 Lakeland Drive [Pltf. Ex.I] on November 21, 2016 at 11:18 a.m. Plaintiff's attorney affirms, upon information and belief that Stanley and Murphy are husband and wife [Kreinces Aff., ¶ 46]. Assuming Patrick was told this, there is a question as to why she did not make service upon Stanley by Murphy.

because he has evinced an intention to forego the objection to personal jurisdiction by continuing this litigation to the extent he has, notwithstanding the timely assertion of the affirmative defense in the answer. In *Beris v Miller*, 128 AD2d 822, 823 [2d Dept 1987], the Court held that "...It cannot be said that the defendant's participation in discovery or moving to strike plaintiff's note of issue for failure to comply with a discovery demand constituted a waiver of lack of personal jurisdiction (internal citations omitted)"; *Williams v Uptown Collision, Inc.*, 243 AD2d 467 [2d Dept 1997], citing *Beris v Miller, supra* (defendants' counterclaim and participation in discovery did not constitute a waiver of defense of lack of personal jurisdiction). Here, the court finds that Stanley's participation in this litigation thus far does not constitute a waiver of the defense of lack of personal jurisdiction. Thus, the sufficiency of the service of process is reviewable.

"A process server's affidavit of service ordinarily constitutes prima facie evidence of proper service." *Rosemark Contrs., Inc. v Ness*, 149 AD3d 1115 [2d Dept 2017]; *Bank of America, N.A. v Latif*, 149 AD3d 967 [2d Dept 2017]. The burden is on the defendant to rebut the representations in the affidavit by a sworn denial of service containing specific facts that will rebut the presumption of proper service established by the process server's affidavit. This shifts the burden to plaintiff to demonstrate at a traverse hearing that the service was effected pursuant to statute. *Scarano v Scarano*, 63 AD3d 716 [2d Dept 2009]. Here, Stanley has met the threshold to establish there are issues of fact that require the conduct of the traverse hearing.

The question then turns to whether the court must conduct the traverse hearing if the affidavit of service on its face, together with the affidavit of Stanley and the other affiants, authorizes the court to dispense with the traverse hearing, particularly when plaintiff has coupled the contesting of personal jurisdiction with a motion to extend the time to serve. Here, it is apparent, upon the parties' submissions, that plaintiff will have a difficult time in sustaining service upon Stanley. To carry her burden, she will need to produce the process server from Mississippi, and defendant may feel it necessary to produce his witnesses to rebut the process server's testimony. But if the court grants the motion to extend the time to serve Stanley, as a matter of public policy, and for judicial economy, there is no need to order the conduct of a traverse hearing.

The court is granted great latitude to grant an application to extend the time to serve the summons and complaint upon good cause shown or in the interests of justice. CPLR § 306-b; *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 105-106 [2001]; *Hourie v North Shore-Long Is. Jewish Health Sys., Inc.- Lenox Hill Hosp.*, 150 AD3d 707 [2d Dept 2017]. Here, the court finds it is well justified in granting this application. Regardless of whether Stanley and Murphy are husband and wife, it is undisputed that they each were in Jackson, Mississippi in November-December, 2016; they practiced together at the time that plaintiff alleges they committed malpractice; they are represented by the same attorneys and presumably insured by the same carrier; as a matter of common sense; Stanley must have known that the action had commenced against him and his former colleagues, as evidenced by his participation in the litigation to the extent described, *supra*; plaintiff has made this motion in a timely fashion; there was an effort to serve Stanley prior to the expiration of the statute of limitations demonstrating

a level of due diligence; and the statute of limitations has expired for the commencement of a new action.

For all of the reasons stated above, the court finds that there is no prejudice, and that it is well within its discretion, in authorizing plaintiff the opportunity to re-serve the complaint upon Stanley. *Wilson v City of New York*, 118 AD3d 983 [2d Dept 2014]; *Moundrakis v Dellis*, 96 AD3d 1026 [2d Dept 2012]. The motion to extend plaintiff's time to serve Stanley is granted.³

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the motion of plaintiff ALBERTA DARKO, made pursuant to CPLR 3211(b), to strike the affirmative defense of lack of personal jurisdiction, as interposed by defendants GARY C. GUERRINO, M.D. ERIN MURPHY, M.D., LAWRENCE MEDICAL ASSOCIATES, P.C. and NEW YORK-PRESBYTERIAN HOSPITAL/COLUMBIA UNIVERSITY MEDICAL CENTER, is granted; and it is further

ORDERED that the motion of plaintiff ALBERTA DARKO, made pursuant to CPLR 3211(b), to strike the affirmative defense of lack of personal jurisdiction, as interposed by defendant GREGORY STANLEY, M.D., is denied; and it is further

ORDERED that the motion of plaintiff ALBERTA DARKA, made pursuant to CPLR § 306-b, for permission to serve the complaint upon defendant GREGORY STANLEY, M.D., is granted; and it is further

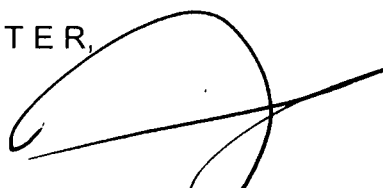
ORDERED that the parties shall appear at the Preliminary Conference Part of the Court, Room 811, on July 31, 2017, at 9:30 a.m.

The foregoing constitutes the Decision/Order of the court.

Dated: White Plains, New York

June 26, 2017

ENTER,



HON. LAWRENCE H. ECKER, J.S.C.

³ Should plaintiff, after the demonstration of due diligence, not be able to again effect good service upon Stanley, due to her inability to locate his present whereabouts, the court, pursuant to CPLR § 308(5), is authorized to order an alternate means of service.

Appearances

Tantleff & Kreinces, LLP
Attorneys for Plaintiff
Via NYSCEF

Santangelo Benvenuto & Slattery
Attorneys for Defendant Gary C. Guerrino, M.D.
Via NYSCEF

Heidell, Pittoni, Murphy & Bach, LLP
Attorneys for Defendants Gregory Stanley, M.D.,
Erin Murphy, M.D., Lawrence Medical Associates, P.C.
and The New York-Presbyterian/Columbia
University Medical Center
Via NYSCEF